

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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RMH TELESERVICES, INC.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 97-CV-7184
	:	
KIPANY PRODUCTIONS, LTD.,	:	
Defendant.	:	
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	:	
KIPANY PRODUCTIONS, LTD.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	NO. 97-CV-7212
	:	
RMH TELESERVICES, INC.,	:	
Defendant.	:	
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McGlynn, J.

March 12, 1998

MEMORANDUM OF DECISION

In these consolidated actions, RMH Teleservices, Inc. ("RMH") seeks to compel arbitration of a dispute with Kipany Productions, Ltd. ("Kipany") over payment for services rendered to Kipany (97-CV-7184).¹ On the other hand, Kipany seeks to enjoin arbitration of the dispute (97-CV-7212).²

At the heart of the matter is a writing which contains an arbitration clause but which writing has not been signed either of

¹ Originally filed in the Court of Common Pleas of Montgomery County, Pennsylvania on October 27, 1997 and removed to this court on December 5, 1997.

² Originally filed in the United States District Court for the Southern District of New York on October 14, 1997 and transferred to this court as of November 13, 1997.

the parties.³ Nevertheless, RMH contends that the course of conduct between the parties demonstrates that all the terms of the writing had been agreed upon by the parties and that the arbitration clause is valid and enforceable. For its part, Kipany disputes this, contending that it specifically informed RMH that the terms contained in the writing were unacceptable and that it would not sign the putative contract.

Thus, there is this threshold credibility issue which cannot be decided on the present state of the record.

In Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51 (3d Cir. 1980), the Third Circuit determined that "before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." Id. at 54. Notably, in Par-Knit, there had been no prior oral discussions or agreements regarding arbitration between the parties. Id. at 53. Therefore, the court determined that "Par-Knit's duty to arbitrate, if any, rests upon a determination as to whether or not the documents in issue were intended by Par-Knit to be contracts." Id.

In the present case, there is a genuine dispute whether the Agreement constituted a binding contract in light of the factual allegations. "In the event that the making of the arbitration agreement is in issue, then 'the court shall proceed summarily to

³ The Federal Arbitration Act requires that an agreement to arbitrate be in writing if it is to be enforceable. 9 U.S.C. § 2. The Act does not mandate that the writing be signed.

the trial' of that issue." Id. at 54; 9 U.S.C. § 4; Aberle Hosiery Co. v. American Arbitration Ass'n, 337 F. Supp. 90, 93 (E.D. Pa.)("If there is no genuine issue as to the making of the agreement, the Court shall order the parties to proceed to arbitration. However, if the making of the agreement is in real dispute, the Court must order a trial of the issue."), appeal dismissed, 461 F.2d 1005 (3d Cir. 1972).

RMH's argument that Kipany's objection to arbitration was untimely completely ignores Kipany's pleadings in 97-CV-7212 of which RMH had notice prior to October 28, 1997. In light of the fact that the two cases have been consolidated and the fact that RMH has not been prejudiced by Kipany's late response to RMH's Motion to Compel in 97-CV-7184, I conclude that there has been no waiver by Kipany of its right to contest arbitration.